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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 140

THE CREEK NATION, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The first opinion of the Court of Claims (R. 14) is reported in 77 C. Cls. 159. The opinion of this Court reversing the original judgment of the Court of Claims (77 C. Cls. 159) is reported in 295 U. S. 103. The second opinion of the Court of Claims (R. 28) is not yet reported.

JURISDICTION

The judgment of the court below was entered on November 9, 1936 (R. 31). On January 4, 1937,

petitioner moved for a new trial (R. 31). On May 3, 1937, an order was entered overruling petitioner's motion for a new trial (R. 32). The petition for a writ of certiorari was filed on June 15, 1937 (R. 32) and was granted on October 11, 1937 (R. 32). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (Sec. 180 of the Judicial Code, as amended (28 U. S. C. A. 288)).

QUESTIONS PRESENTED

1. Whether, in determining the date as of which the lands should be valued, the Court of Claims correctly followed the decision of this Court in fixing the date of the "appropriation" of the lands involved as the date of the approval of the Act of February 13, 1891.

2. Whether, if the Court of Claims did err in determining the date as of which the lands were appropriated and should be valued, the cause should be remanded with directions to award the value of the lands as of (1) the date upon which the lands were opened to settlement; (2) the dates upon which homestead entries were made; (3) the dates when final certificates of entry or (4) patents were issued, or (5) as of 1872, when the lands were first occupied by the Sac and Fox Indians to the exclusion of the Creek Nation.

STATUTES INVOLVED

Pertinent portions of the Act of February 13, 1891, c. 165, 26 Stat. 749, and of the Proclamation

of September 18, 1891, 27 Stat. 989, are set forth in the Appendix, *infra*, pp. 24–27.

STATEMENT

The facts, leading up to the decision of this Court, are stated in its opinion of April 29, 1935 (295 U. S. 103, 105–108), set forth at length in the brief of petitioner at pages 2–5. In that opinion (p. 111) this Court said:

> Plainly the appropriation was not in 1873, when Darling's survey was approved by the Commissioner of the General Land Office. That survey did not effect any change in the existing ownership; nor was it intended to do so. The most that can be said of it is that it was done erroneously and, in the absence of correction, might lead to further error.
>
> But not so of the disposals under the act of 1891. They were intended from their inception to effect a change of ownership and were consummated by the issue of patents, the most accredited type of conveyance known to our law. True, they rested on an erroneous application of the act of 1891 to the Creek lands in the strip; but, as that application was confirmed by the United States, *the matter stands as if the act had distinctly directed the disposals.* It was through them that the lands were taken; so the compensation should be based on the value at that time, and not, as ruled below, on the value when the suit was begun. [Italics supplied.]

On the retrial by the Court of Claims, under the mandate of this Court, the opinion was interpreted to mean that the taking of the lands involved occurred as of the date of the approval of the Act of 1891, *infra*, p. 24 (R. 31).

SUMMARY OF ARGUMENT

I. In its previous opinion, 295 U. S. 103, the Court directed that the Creek Nation be given just compensation for the "taking" of its land. Elementary principles and the former opinion establish that this Court could not have had in mind the dates of the issuance of the patents. A patent issued by the Government to lands it does not already own is a nullity and can not constitute a taking.

The theory used by the previous opinion impels the conclusion that the Act of 1891 constituted the "taking." This Court ruled that though the disposals of the land were erroneous, at the time they were made, yet in view of their subsequent confirmation they must be regarded as consonant with a proper construction of the Act; that is, the Act must be deemed to have accepted these lands from the Sac and Fox Nation, and to have provided for their future disposal. The Act therefore constituted the "taking."

The language used in the prior opinion reenforces this view. For example, the statement that the "compensation should be based on the value *at that time*" [Italics supplied] obviously refers

to the date of the appropriation of the whole tract by the Act of 1891 at one time, and not to those separate times at which patents were issued between 1893 and 1909.

II. If not the date of the Act of 1891, then the opening of the lands to settlement (or any other of the several steps in the process of expropriation of the lands by the United States before the issuance of formal patents) is the exercise of dominion which marks the time as of which the lands are to be valued—rather than the subsequent issuance of formal patents, which merely complete the record title and confer no more than the United States owns. *United States v. Conway*, 175 U. S. 60, 68.

III. Under the doctrine of the recent decision of this Court in *Shoshone Tribe of Indians v. United States*, 299 U. S. 476, there was a true "taking" or an "appropriation" in 1872 when the Sac and Fox Indians occupied the lands in question "to the exclusion of the Creek Nation", who were then "deprived of the use and enjoyment" thereof.

ARGUMENT

I

PETITIONER'S CONTENTION IS UNTENABLE AND THE COURT OF CLAIMS CORRECTLY FOLLOWED THE PREVIOUS OPINION OF THIS COURT IN THIS CASE

Applying its own rules of grammar to the language of this Court's previous opinion in this case (295 U. S. 103) and relying upon its own lexical analysis of the word "disposals" therein, petitioner contends that the several dates upon which patents

were issued to homesteaders mark the times as of which the lands must be valued.

1. Petitioner's contention is untenable. In the first place, it is obvious that this Court must necessarily have directed the valuation of the lands as of the time that the United States *took* possession or appropriated them from the Creek Nation—not when the Government made the homesteaders' indicia of title complete by the issuance of patents, as petitioner now contends. Petitioner fails to perceive the obvious distinction between the taking of lands and the disposal of lands previously taken. This Court unequivocally stated that the Indians are entitled to "the value of the lands at the time of the taking" plus interest from that date, and rested its opinion upon such cases as *United States* v. *Rogers,* 255 U. S. 163, 169, and *Seaboard Air Line Ry.* v. *United States,* 261 U. S. 299, 304–306, in which the same principle of valuation controlled.

2. Petitioner apparently assumes that, although the United States does not own lands, the mere issuance of a patent to them can constitute a "taking" by the United States. The law is otherwise, for as this Court has said, "nothing is better settled by this Court than that a patent issued by the United States to lands which they do not own is a simple nullity." *United States* v. *Conway,* 175 U. S. 60, 68. Similarly, in *Knight* v. *United States Land Association,* 142 U. S. 161, 176, it was said:

> Ever since the decision in *Polk's Lessee* v. *Wendal,* 9 Cranch. 87, it has been the set-

> tled law of this court that a patent is void at law if the grantor State had no title to the premises embraced in it, or if the officer who issued the patent had no authority so to do, and that the want of such title or authority can be shown in an action at law. *Patterson* v. *Winn,* 11 Wheat. 380, 384; *Stoddard* v. *Chambers,* 2 How. 284, 318; *Easton* v. *Salisbury,* 21 How. 426; *Reichart* v. *Felps,* 6 Wall. 160; *Best* v. *Polk,* 18 Wall. 112; *Smelting Co.* v. *Kemp,* 104 U. S. 636; *Steel* v. *Smelting Co.,* 106 U. S. 447, 453; *Wright* v. *Roseberry,* 121 U. S. 488, 519; *Doolan* v. *Carr,* 125 U. S. 618, 625, and authorities there cited.

From these decisions it is clear that the mere issuance of patents to lands, which are not a part of the patentable domain, is far from a "taking" of them. The patents, like any other conveyance, may be determinative as between the patentees and the Government, but they are wholly "inoperative and void" insofar as the true owners of the property are concerned. See *Smelting Co.* v. *Kemp,* 104 U. S. 636, 641. Hence is is obvious that the patents issued by the United States in no way divested the Creek Nation of their lands unless there had been a prior "taking" or "appropriation" of them by the Government. The dates of the patents are therefore irrelevant.

3. If petitioner's insistence that a taking occurred only when the patents were issued is based on the assumption that the divestiture of legal title

is necessary for a taking, it is sufficient to refer to cases in this Court holding that a taking of property in the constitutional sense can be accomplished without fully divesting the owner of the fee. *United States* v. *Cress,* 243 U. S. 316, 328; *United States* v. *Lynah,* 188 U. S. 445, 470.

A striking example of a "taking" without a divestiture of legal title is found in the recent case of *Shoshone Tribe of Indians* v. *United States,* 299 U. S. 476. There, although the Court found that "title in the strict sense was always in the United States" the plaintiff was held entitled to compensation for the deprivation of its "treaty right of occupancy with all its beneficial incidents" (P. 496). In other words, there was considered to have occurred an appropriation or taking of an interest less than a fee just as in *Pumpelly* v. *Green Bay Co.,* 13 Wall. 166, 181; and *United States* v. *Welch,* 217 U. S. 333, 339. And it is apparent, even where the Government eventually acquires the entire fee, that the taking may occur years prior to the transfer of the legal title. See *United States* v. *Rogers,* 255 U. S. 163, 167–169.

4. A reading of this Court's prior opinion, and a careful analysis of the theory used by this Court, impels the conclusion that the Act of 1891 constituted the "taking" of the lands.

This Court employed a doctrine of "relation back," according to which the disposals must be deemed to have been directed by the Act of 1891. In considering the authority for these disposals the Court said (295 U. S., p. 111):

> True, they rested on an erroneous application of the act of 1891 to the Creek lands in the strip; but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the disposals.

By his proclamation of September 18, 1891, see *infra*, p. 26, President Harrison opened to settlement the lands previously ceded to the United States by the Sac and Fox Indians in the agreement ratified in the Act of February 13, 1891. Acting under this proclamation, officials of the Indian Bureau and the General Land Office threw open the entire area of the Sac and Fox reservation, including the lands in question (R. 12, 16).

Under this Court's theory, the disposals of the lands involved were erroneous when made; but this Court has ruled that in legal contemplation, in view of the subsequent confirmation of the disposals, they must be deemed to have been proper when made, i. e., to be proper constructions of the Act. Under its theory, the disposals, at the time they were made, were not authorized by the Act of 1891 since the lands belonged to the Creek Nation and had not been conveyed to the Government by the Sac and Fox Nation; but this Court has ruled that in legal contemplation "the matter stands as if the act had distinctly directed the disposals," that is, as if the land had been conveyed to the United States by the Sac and Fox Indians. In short, therefore, this Court has ruled that in legal contempla-

tion the Government accepted the lands from the Sac and Fox Nation by Section 1 of the Act of 1891, ratifying the agreement. And over all such lands, ceded by the Sac and Fox Nation, the Act itself purported to exercise dominion—by provision for future allotment to the Indians and future settlement by homesteaders. It seems clear that the "taking" of these lands from the Creek Nation must be deemed to have occurred at this time, when the Government must be considered to have received them from the Sac and Fox Nation and when it exercised initial dominion in the provisions for allotment and for homesteaders.

5. Careful examination of the language used by this Court in its former opinion reenforces the view that it is the Act of 1891 which constituted the taking.

(a) The Court concluded that, since "the matter stands as if *the act* had distinctly directed the disposals," the "compensation should be based on the value *at that time*"—obviously referring to the time of the approval of the Act. [Italics supplied.] It seems clear, also, that "at that time" refers to the date of the appropriation of the *whole* tract by the Act of 1891 at one time, and not to *those* separate *times* at which patents were issued between 1893 and 1909, and there is no need for indulging in any elaborate grammatical discussion of the Court's language such as petitioner presents in its brief (Br. 25–29). As the Court below well said (R. 30–31):

> The words "at that time" clearly refer to the act of 1891, under the erroneous application of which "disposals" of plaintiff's lands were made. If the act of 1891 had directed the "disposals," the "taking" undoubtedly would have been as of the date of the act, and since the Court holds that the matter stands as if the act had distinctly directed the "disposals," there can be no doubt that plaintiff's compensation for the lands taken must, under the Court's decision, be based on the value of the lands as of the date of the approval of that act, February 13, 1891, * * *.

(b) Petitioner adverts to the statement that the disposals "were consummated by the issue of patents signed by the President." 295 U. S. at 110. But petitioner ignores the fact that the disposals had an "inception" as well as a "consummation." In contrasting the disposals with the survey of 1873, which was not intended to have any effect on ownership, the Court said "Not so of the disposals under the act of 1891. They were intended *from their inception* to effect a change of ownership" [italics supplied]. See 295 U. S. at 111. In reasoning out a relation back to the date of the Act, this Court showed that the "disposals" had their inception in the Act of 1891. Section 1 of the Act ratifying the agreement with the Sac and Fox Nation and accepting the lands thereunder, constitutes a "taking" of the lands. Section 7 takes the first step toward disposal, under the homestead

laws, "of the lands acquired by the agreements in this act ratified and confirmed," i. e., of the lands which had been "taken" by the agreements ratified in Section 1.

(c) Petitioner adverts to the statement that the lands were taken "through" the disposals, and

> were appropriated by the United States in circumstances which involved an implied undertaking by it to make just compensation to the tribe (295 U. S., p. 111).

The theory of an implied undertaking is applicable to all cases of taking of property by the Government, through condemnation proceedings or not, *Jacobs* v. *United States,* 290 U. S. 13, 16, 17, the promise to pay just compensation being implied at the time the landowner is deprived of the beneficial use of his property. *United States* v. *Lynah,* 188 U. S. 445, 465; *United States* v. *North American Co.,* 253 U. S. 330, 333.

The Creek Nation had been out of possession of these lands since 1872 (*infra,* p. 19). Aside from that fact, the taking of these particular lands by the Government did not become evident prior to the disposals. The disposals were visible acts of dominion. Until these disposals, subsequently confirmed, were made there was no need for any determination or theory that any lands had been taken. But though the disposals showed that the land had been taken, the taking must be deemed to have occurred at the time of the passage of the Act which is deemed by this Court to have directed the disposals.

6. The position taken by the Court of Claims in obedience to the mandate of this Court is fortified by other cases decided by this Court holding that an Indian tribe was divested of its interest in land by the legislative fiat of Congress, rather than by some administrative action thereunder. *Missouri, Kansas and Texas Railway Co.* v. *Roberts,* 152 U. S. 114; cf. *Lone Wolf* v. *Hitchcock,* 187 U. S. 553.

In contending for the value as of the date when administrative action was taken under the Act of 1891, petitioner suggests that the Act be "considered as an eminent domain statute authorizing the taking of these Creek lands" (Br. 16, 24–25). The Act is totally unlike an ordinary statute which authorizes the condemnation of certain lands at the discretion of administrative officers. The Act authorized and directed the officers to dispose of the land, but the prior "taking" of the land was accomplished by the Act itself—in the provision accepting title to the land, and in the exercise of dominion to the extent of providing for future disposal. This is true either by the doctrine of relation back or by virtue of the fact that these lands were included within the express terms of the Act. It appears from the Act that when the Sac and Fox Nation ceded their interest in the Indian Territory by the Treaty ratified by the Act, they conveyed (1) not only all "their title, claim, and interest of every kind and character" in the land specifically described in said Act (which did not include the

lands in question) but also (2) "all other land or country in Indian Territory in which said Sac and Fox Nation has or *claims* any title, claim, or interest." [Italics supplied.]

This agreement and statute were executed in the light of a factual background which was characterized by the action of the Sac and Fox Nation in occupying the land and, under the erroneous surveys, in excluding the Creek Nation which had been deprived since 1872 of the use and enjoyment of the land (R. 11, par. IX; R. 12, par. XVI). The Sac and Fox Nation had a definite claim to the land, and Congress explicitly accepted all land to which that Nation had a claim, for purposes of allotment to Indians and white settlement.

II

IF THE DATE OF THE APPROVAL OF THE ACT OF 1891 DOES NOT MARK THE LATEST DATE AS OF WHICH THE LANDS SHOULD BE VALUED, THEN THE OPENING OF THE LANDS TO SETTLEMENT (OR ANY OTHER STEP IN THE PROCESS BEFORE THE ISSUANCE OF PATENTS TO SETTLERS) CONSTITUTED THE REQUISITE EXERCISE OF DOMINION AND FIXES THE DATE AS OF WHICH THE LANDS SHOULD BE VALUED

If, however, it is decided that the appropriation of the lands occurred as of some date later than the date of the approval of the Act of 1891, it seems obvious that the particular step in the disposals which constituted the taking was not the issuance of patents, as the petitioner contends.

The disposals of the lands to homesteaders involved not a single step, as the petitioner assumes, but several, of which four are separate and distinct both in character and in point of time: (1) the opening of the land to settlement; (2) settlement by the homesteader, followed shortly thereafter by his application for entry, which, if it complies with the homestead laws, is allowed by officials of the Land Office and entered of record; (3) the issuance of final certificates of entry; and (4) the issuance of patents:[1]

(1) Proceeding under the provisions of the Act of 1891, executive officers of the Government opened the lands to settlement (R. 11–12). This subjected them to acquisition by any settler complying with the requisites of the homestead laws. It is submitted that this constituted an appropriation in the constitutional sense, since the United States thereby exercised a dominion over the lands in question inconsistent with ownership of the fee by the Creek Nation.

If, however, opening the lands to settlement is not an appropriation, it is submitted that other steps taken in the process of acquiring fee simple title to lands under the homestead laws may more logically be said to constitute a taking than the issuance of a patent, as follows:

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[1] See Circular No. 541, Department of the Interior, General Land Office (1926).

(2) Subsequent to the Act of May 14, 1880, 21 Stat. 141, Sec. 3, the homesteader, upon settlement, acquires an interest in the lands which is protected against all the world, except the United States. *Knapp* v. *Alexander Edgar Lumber Co.*, 237 U. S. 162, 166; *Ard* v. *Brandon*, 156 U. S. 537; *Whitney* v. *Taylor*, 158 U. S. 85; *United States* v. *Turner*, 54 Fed. 228 (C. C. S. D. Ala.); *United States* v. *Bagnell Timber Co.*, 178 Fed. 795 (C. C. A. 8th). "From the making of his entry the homesteader has * * * an inchoate title, subject to be defeated only by failure on his part to comply with the requirements of the homestead law as to settlement and cultivation. So long as he complies with these laws in the course of earning a complete right to the lands as against the Government he has a substantial inceptive title, sufficient as against third parties to support suits in equity or at law." *Knapp* v. *Alexander Edgar Lumber Co.*, *supra*, pp. 166–167.

Thus it can truly be said that, when there is a settlement, there is an appropriation of the land. All the steps taken thereafter by the settler are merely cumulative and in pursuance of consummating the original appropriation. The act of settlement removes the land from the public domain. *Whitney* v. *Taylor*, 158 U. S. 85, 88, 92. The settler thereby acquires prior rights against subsequent claimants and subsequent grantees. *Osborne* v. *Froyseth*, 216 U. S. 452, 460. It is submitted, therefore, that the dates of original settle-

ment by the various patentees may well be considered the date of the "disposals" under the former opinion of this Court.

(3) But if it be the opinion of this Court that the date of settlement is not the date of taking, then it is submitted that the date of the issuance of the final certificates of entry must be the date of taking. Such a certificate conveys a title which is good against all persons except the United States. *Boulton* v. *Telfer,* 52 Idaho 185, certiorari denied, 287 U. S. 655. Thereupon the land comes under unfettered state control with respect to inheritance and conveyancing. *United States* v. *Detroit Lumber Co.,* 200 U. S. 321, 337, 338. The completeness of the divestiture of ownership of the United States is shown by the fact that, after the issuance of a final certificate of title, such lands are subject to state taxation: *Exchange Trust Co.* v. *Drainage District,* 278 U. S. 421, 425. The sum total of the incidents of ownership including its burdens are then in the homesteader. The homesteader is entitled to have his record title complete; and if no proceedings have been taken within two years questioning the validity of the entry and the Secretary of the Interior has failed to issue a patent, a writ of mandamus will lie ordering him to issue it. *Lane* v. *Hoglund,* 244 U. S. 174, 181.

(4) On the other hand, as set forth in point I above, the mere issuance of formal letters patent merely completes the record title, involves no more

than a ministerial act (*Lane* v. *Hoglund, supra*), and confers no rights which the United States does not have, *United States* v. *Conway,* 175 U. S. 60, 68. Since this formality becomes "a simple nullity" where the United States purports to convey "lands which they do not own" (*United States* v. *Conway, supra*), their issuance takes nothing from third party owners and hence cannot be a "taking" or appropriation.

III

UNDER THE DOCTRINE OF THE RECENT SHOSHONE CASE THE APPROPRIATION OCCURRED WHEN THE SAC AND FOX NATION TOOK POSSESSION OF THE LANDS

The respondent feels under an obligation to call attention to the fact that, after the Court of Claims rendered the opinion and judgment which is the basis of this appeal, this Court decided *Shoshone Tribe of Indians* v. *United States,* 299 U. S. 476. In the latter case Arapahoes, under military escort, tortiously entered on lands of the Shoshone tribes and permanently occupied them. This Court held that by "action and inaction" the legislative and executive branches of the Government ratified the "*de facto* appropriation" of the lands, that the Government was required to compensate the Shoshones, and that the date of evaluation should be the date of the original wrongful entry by the Arapahoes.

The Court of Claims made the following findings of fact at the first trial of this case (Finding No. IX, R. 11):

> As a result of the erroneous survey of 1872, and approval thereof by the Commissioner of the General Land Office, a certain strip of land between the closing corner of the Darling Survey and the Bardwell line, aggregating 5,575.57 acres, was erroneously included within the area of the Sac and Fox Reservation and was *thereafter occupied by that Nation to the exclusion of the Creek Nation.*

(Finding No. XVI, R. 12):

> As a result of the erroneous survey by Darling in 1872 and the subsequent disposition of the area in question by allotments or issuance of patents to settlers, the plaintiffs have been deprived *since 1872* of the use and enjoyment of a part of their reservation of the aggregate area of 5,575.57 acres, excepting only 118.4 acres allotted or patented to certain members of the Creek Nation. [Italics supplied.]

These findings are conclusive on this Court and not subject to review. *Luckenbach Steamship Co.* v. *United States,* 272 U. S. 533, 540.

Since the transactions concerning the lands here involved were by the "action and inaction" of the executive and legislative branches, ratified or, as this Court said in its prior opinion herein, "con-

firmed," the instant case seems on all fours with the *Shoshone* case.

It may be noted that it is appropriate for this Court to consider the *Shoshone* case notwithstanding the fact that its previous opinion in this case reversed the judgment "with directions for such further proceedings as may be necessary to bring the award of compensation into conformity with this opinion," see *United States v. Creek Nation*, 295 U. S. at 112. That mandate was binding on the Court of Claims, which could not "vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal", see *Eastern Cherokees* v. *United States*, 225 U. S. 572, 582. But this Court is not bound by its own former judgment. It may examine that result in order to do justice in the light of intermediate decisions.

Indeed, although a subsequent decision of this Court may perhaps not permit the overturning of a final judgment entered at a previous term, *Scotten* v. *Littlefield*, 235 U. S. 407, it appears that in the circumstances of this case the Government may request of this Court permission to file in the Court of Claims a petition for rehearing because of the subsequent decision in the *Shoshone* case. Precedent for this procedure may be found in *Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82. In that case a patentee brought suit for patent infringement and unfair competition. The Court of Appeals

for the Third Circuit dismissed the bill as to the former ground and granted a permanent injunction as to the latter, leaving the case pending for an accounting before a Master. A subsequent decision of this Court held the patent valid. It was held that the Court of Appeals for the Third Circuit had properly permitted the plaintiff to file in the District Court a petition for rehearing, and that it should have approved the order of the District Court making the judgment conform to the decision in this Court. (See pp. 91, 92):

> As the decree in question was entered pursuant to the mandate of an appellate court, proper deference to its authority required that a proceeding to reopen it, whether by rehearing or review, should be first referred to that tribunal. *Southard* v. *Russell,* 16 How. 547, 570–571; *In re Potts,* 166 U. S. 263, 267; *National Brake & Electric Co.* v. *Christensen,* 254 U. S. 425, 430–431.
>
> That having been done in this case, and leave for the purpose obtained (leave to grant a "review" fairly included any step short of that), what obstacle stood in the way of correcting the decree? The suit was still pending; plaintiffs applied promptly after the decision of this court in the *Abercrombie & Fitch Co.* suit, 245 U. S. 198. It was eminently proper that the decree in the present suit should be made to conform to that decision, in the absence of some special obstacle. * * *

> Our decision in *Abercrombie & Fitch Co.* v. *Baldwin*, 245 U. S. 198, must be taken as not only demonstrating that the Circuit Court of Appeals erred in its disposition of this case upon the first appeal (219 Fed. 735), but that the error, even though not amounting to "error apparent," within the meaning of Lord Bacon's first ordinance, afforded ample ground for setting matters right upon a rehearing before final decree, as was in effect done by the District Court.
>
> * * *

If this cause were now remanded because of some error in construing the previous mandate, the Government in the future would be entitled to present the *Shoshone* case to this Court, upon a motion to permit the filing of a petition for rehearing in the Court of Claims. Since this Court has the power to consider the effect of the *Shoshone* decision on this case, we see no adequate reason why that power should not be exercised at this time and the *Shoshone* case considered in the course of preparing the mandate to the Court of Claims.

This procedure is not precluded by any doctrine that the law as announced on the first appeal is the "law of the case." In *Messenger* v. *Anderson*, 225 U. S. 436, it was held that a Circuit Court of Appeals, which had before it, in the second trial of the same case, a will previously construed by it, could change its rule to conform to that subsequently announced by the highest court of the State in which the real estate affected was situated. Mr.

Justice Holmes, speaking for the Court, stated (p. 444):

> In the absence of statute, the phrase *law of the case,* as applied to the effect of previous orders on the later action of the court rendering them in the same case, *merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.* [Italics supplied.]

CONCLUSION

Wherefore, it is respectfully submitted that the Court of Claims correctly followed the mandate of this Court and that petitioner's contention that the dates of the patents are the dates when the lands must be valued is wholly untenable. Furthermore, it is submitted that if the Court determines that the judgment below is not correct the cause should be remanded to the Court of Claims, with directions to award petitioner the value of the lands as of 1872, when the Creek Nation was first deprived of possession.

STANLEY REED,
Solicitor General.

CARL MCFARLAND,
Assistant Attorney General.

N. A. TOWNSEND,
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Attorneys.

DECEMBER 1937.

APPENDIX

Act of February 13, 1891, 51st Cong., 2d Sess., c. 165, 26 Stat. 749:

> Whereas David H. Jerome, Alfred M. Wilson, and Warren G. Sayre, duly appointed commissioners on the part of the United States, did on the twelfth day of June, eighteen hundred and ninety, conclude an agreement with the Sac and Fox Nation of Indians, occupying a reservation in the Territory of Oklahoma, formerly a part of the Indian Territory, which said agreement is in words and figures as follows, to wit:
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> * * * * *
>
> ARTICLE I. The said the Sac and Fox Nation hereby cedes, conveys, transfers, surrenders and forever relinquishes to the United States of America, all their title, claim or interest, of every kind or character, in and to the following described tract of land or country, in the Indian Territory, to-wit: * * *
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> * * * * *
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> * * * and all other land or country in Indian Territory, in which said Sac and Fox Nation has or claims any title, claim or interest.
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> * * * * *
>
> * * * It is further agreed that as soon as such allotments are so made, and approved by the Department of the Interior, and the provisional patents hereinbefore provided for are issued, then the residue of said tract of country, shall, as far as said Sac and Fox

Nation is concerned, become public lands of the United States, and under such restrictions as may be imposed by law, be subject to white settlement. * * *

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That said agreements be, and the same are hereby, accepted, ratified, and confirmed.

* * * * *

SEC. 7. That whenever any of the lands acquired by the agreements in this act ratified and confirmed, shall by operation of law or proclamation of the President of the United States, be open to settlement, they shall be disposed of to actual settlers only, under the provisions of the homestead laws, except section twenty-three hundred and one, which shall not apply: *Provided, however,* That each settler, under and in accordance with the provisions of said homestead laws, shall, before receiving a patent for his homestead, pay to the United States for the land so taken by him, in addition to the fees provided by law, the sum of one dollar and twenty-five cents for each acre thereof, and such person, having complied with all the laws relating to such homestead settlement, may at his option receive a patent therefor at the expiration of twelve months from date of settlement upon said homestead and any person otherwise qualified who has attempted to but for any cause failed to secure a title in fee to a homestead under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make a homestead entry upon any of said lands.

Proclamation No. 7, September 18, 1891, 27 Stat. 989:

> Whereas, by a written agreement, made on the twelfth day of June, eighteen hundred and ninety, the Sac and Fox Nation of Indians, in the Territory of Oklahoma, ceded and conveyed to the United States of America all title or interest of said Indians in and to the lands particularly described in Article I of the agreement, except the quarter section of land on which the Sac and Fox Agency is located: and provided that the section of land now designated and set apart near the Sac and Fox Agency for a school and farm shall not be subject either to allotment or to homestead entry; that every citizen of said Nation shall have an allotment of land, in quantity as therein stated, to be selected within the tract of country so ceded, except in sections sixteen (16) and thirty-six (36) in each Congressional township, and except the Agency quarter section and section set apart for school and farm, as above mentioned, or other lands selected in lieu thereof; that when the allotments to the citizens of the Sac and Fox Nation are made the Secretary of the Interior shall cause trust patents to issue therefor in the name of the allottees, and that as soon as such allotments are so made, and approved by the Department of the Interior, and the patents provided for are issued, then the residue of said tract of country shall, as far as said Sac and Fox Nation is concerned, become public lands of the United States, and under such restrictions as may be imposed by law, be subject to white settlement;
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> * * *
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> * * * * *

Now, therefore, I, Benjamin Harrison, President of the United States, by virtue of the power in me vested by the Statutes hereinbefore mentioned, * * * do hereby declare and make known that all of the lands acquired from the Sac and Fox Nation of Indians, * * * will, at and after the hour of twelve o'clock noon (central standard time), Tuesday, the twenty-second day of this, the present month of September, and not before, be opened to settlement, under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreements, the Statutes above specified, and the laws of the United States applicable thereto.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

No. 140.—October Term, 1937.

The Creek Nation, Petitioner,
vs.
The United States.
} On Writ of Certiorari to the Court of Claims.

[January 17, 1938.]

Mr. Justice Roberts delivered the opinion of the Court.

When this case was here before[1] petitioner was held entitled to recover compensation from the respondent for the taking of lands belonging to the petitioner constituting a portion of a larger tract granted to the Creek Nation in 1833. The boundary lines of petitioner's lands had been erroneously run in 1872 and, as a result, an area set apart for other Indian tribes included over five thousand acres belonging to the petitioner. Those tribes ceded their lands to the respondent upon an agreement that allotments should be made to their members in severalty. The Act of February 13, 1891,[2] which ratified this agreement, provided that any lands not so allotted should be opened to settlement and sold to settlers, the proceeds to be covered into the Treasury as public moneys. Pursuant to this statute lands which in truth belonged to petitioner were, due to the error in the survey of 1872, allotted and patented to Sac and Fox Indians and sold and patented to settlers in the period from 1893 to 1909. The patentees have since held adversely to petitioner. As was said in the former opinion, "The tribe contended for the value in 1926, when the suit was brought; while the Government stood for the value at the time of the appropriation, which it insisted was in 1873, when Darling's erroneous survey was approved by the Commissioner of the General Land Office, or, in the alternative, at the time the lands were disposed of under the act of 1891." It was held that the alternative contention was correct and, as the Court of Claims had awarded the petitioner judgment for the 1926 value, the cause was reversed and remanded. Upon a further hearing that court overruled the claim of petitioner

[1] United States *v.* Creek Nation, 295 U. S. 103.
[2] C. 165, 26 Stat. 749.

that the dates of actual disposal were those as of which value should be ascertained and valued the lands taken as of February 13, 1891, the date of the act pursuant to which the executive had caused them to be patented.

In the former opinion, after holding that the approval of the erroneous survey in 1873 did not constitute an appropriation of petitioner's lands, the court said: "But not so of the disposals under the act of 1891. They were intended from their inception to effect a change of ownership and were consummated by the issue of patents, the most accredited type of conveyance known to our law. True, they rested on an erroneous application of the act of 1891 to the Creek lands in the strip; but, as that application was confirmed by the United States, the matter stands as if the act had distinctly directed the disposals. It was through them that the lands were taken; so the compensation should be based on the value at that time, ..."

The court below has misinterpreted that decision. The act of 1891 did not dispose of the lands. Its erroneous application and the consequent disposals of the lands to adverse holders constituted the taking by the United States. The petitioner is entitled to the present full equivalent of the value of the lands, without improvements, as of the date of the patents of the various parcels, if, as we assume, the patent in each instance issued promptly after the delivery of the final certificate; but if a substantial interval elapsed between the date of certificate and of patent, then as of the date of the certificate. A fair approximation or average of values may be adopted to avoid burdensome detailed computation of value as of the date of disposal of each separate tract.

The judgment is reversed and the cause remanded for further proceedings in conformity with this opinion.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.